No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSON and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant, Al Freed, plead *nolo contendere* to two counts of an Indictment, each charging him with participating in the known presentation of Federal Housing Administration applications, more than three years prior to the filing of the Indictment.

Statement of Facts.

The Appellant, Al Freed, was one of the defendants named in the Indictment, found and filed in the above entitled cause on the 28th day of June, 1950 [Tr. of Rec. pp. 3 to 6]. He, thereafter, by Motion to Dismiss and Quash [Tr. of Rec. p. 8], properly noticed for hearing [Tr. of Rec. p. 7], challenged the legal sufficiency of certain counts of said Indictment, including Counts 2 and

4, "upon the ground that each and all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282." [Tr. of Rec. p. 8.]

During the time his said Motion to Dismiss and Quash was pending, Appellant filed a Bill and Motion for Bill of Particulars, wherein he sought to factually obtain the details of the time wherein the acts complained of in each of the counts, were committed [Tr. of Rec. pp. 9-38]. The Motion to Dismiss and Quash and the Motion for Bill of Particulars were both heard by the court on September 25, 1950 [Tr. of Rec. p. 38], at which time the court denied the Motion for Bill of Particulars [Tr. of Rec. p. 39], and also denied the Motions to Dismiss and Quash [Tr. of Rec. p. 40], the learned District Court holding that the acts complained of were a "fraud" against the United States and based its holding upon said ground [Tr. of Rec. pp. 48-51].

On October 30, 1950, Appellant plead not guilty to all counts contained in the Indictment [Tr. of Rec. pp. 40-42]. Thereafter, permission being granted, the Appellant withdrew his respective pleas as to Counts 2 and 4 and thereupon, plead *"nolo contendere"* to Counts 2 and 4 [Tr. of Rec. pp. 4, 5.] On the 4th day of June, 1951, the court entered its Judgment and Commitment, adjudging that the Appellant "has been convicted upon his plea of *nolo contendere* to each of Counts 2 and 4 of the offenses of (Count 2) that on or about February 6, 1947, in Los Angeles County, California, defendant did prepare and present a credit application to the Bank of America N. T. & S. A., with intent such loan be insured by the Federal

Housing Administration, representing said credit was for purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for purchase of materials for construction of a new dwelling house; (Count 4 charges violation similar to Count 2 occurring on or about January 27, 1947), as charged in said Indictment . . ." [Tr. of Rec. pp. 42-43]. The court thereupon ordered the Appellant "committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2 and pay unto the United States of America a fine of $1,000.00 on Count 4; and stand committed to an institution of the jail type until said fine is paid or he is discharged therefrom by due process of law" [Tr. of Rec. p. 43].

Issues.

It is respectfully submitted that the issues herein presented are as follows:

(1) Are Counts 2 and 4 of the Indictment barred by the Statute of Limitations and particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282?

(2) Having plead *nolo contendere* to said counts, may the Appellant at this time, contend that such counts do not state a public offense by reason of the fact that they are barred by the Statute of Limitations?

(3) Does Count 4 state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof?

STATEMENT OF LAW.

I.

That Counts Two (2) and Four (4) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Section 3281 of (Title 18) United States Code—Crimes and Criminal Procedure, as approved on June 25, 1948, and which became effective on September 1, 1948, provides that in capital offenses, the Indictment "may be found at any time without limitation." The succeeding section, Section 3282, of said Code pertains to all offenses not capital and provides as follows:

> *"Offenses not capital*
>
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

During the emergency which arose by reason of World War II, a "wartime suspension of limitation" was passed; such provision is contained in Section 3287 of said Code and provides as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) Committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, can-

cellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, *shall be suspended until three years after the termination of hostilities as proclaimed by the President* or by a concurrent resolution of Congress." (Emphasis ours.)

The court's attention is invited to the fact that the Statute of Limitations ceased to be suspended three (3) years after the termination of hostilities, as proclaimed by the President.

On the 31st day of December, 1946, Harry S. Truman, President of the United States, issued his proclamation, as follows:

"Proclamation 2714

Cessation of Hostilities of World War II

By the President of the United States of America

A Proclamation

"With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory

into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, *that hostilities have terminated.*

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the *cessation of hostilities of World War II. effective twelve o'clock noon, December 31, 1946.*

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

HARRY S. TRUMAN.

By the President:

James F. Byrnes,
The Secretary of State." (Emphasis ours.)

This document designated P. R. Doc. (19)46-22110 was filed with the Archives of the United States on December 31, 1946, at 1:19 P. M., and appears in 12 Fed. Reg., p. 1, col. 1 (January 1, 1947).

In the first paragraph of the proclamation the President proclaims "that hostilities have terminated." In the succeeding paragraph, he proclaims "the cessation of hostilities." Both of these statements are to the same effect.

The definitions of the phrases: "cessation," "ceased," "termination" and "terminate," as found in both Webster's Unabridged and the Universal Dictionary, indicate that said words are synonymous. Both are defined as to carry the thought of putting to an end, finish or concluding. Likewise the legal definition of such words, as defined by our courts, carry the same definitions.

The court's attention is invited to the definition of the word terminate, found in 62 Corpus Juris 732, termination found in 62 Corpus Juris 753, cease, found in 14 Corpus Juris Secundum 58 and cessation, 14 Corpus Juris Secundum 347.

The court is also requested to take judicial notice of the fact that following the President's proclamation, the Armies of the United States were diminished to a peacetime basis, the surplus war supplies of the United States were sold, many of the Naval vessels of the United States were made inactive and sealed and every act was done by the Government and its Military Authorities that would reasonably indicate a position that hostilities had come to an end, had been finished and concluded.

It is therefore respectfully submitted that proclamation 2714 of the President, dated December 31, 1946, by the terms of Section 3287, makes said statute inoperative three (3) years thereafter and that the Statute of Limitations was reinstated as of the 31st day of December, 1949, more than a reasonable period prior to the founding and return of the Indictment herein, on the 28th day of June, 1950.

(a) That Said Section 3287 Is Inapplicable to the Offenses Charged in Counts Two (2) and Four (4) of the Indictment.

Said Section 3287 is limited in its application by its phraseology to three types of cases. The only one pertinent herein is the first class "involving fraud or attempted fraud against the United States or any agency thereof." It is the contention of Appellant that the offenses herein charged are not within such category. The gravamen of the offenses charged in Counts Two (2) and Four (4) of the Indictment is that the defendant "made, passed, uttered and published a statement and caused the same to be presented to the Bank of America National Trust and Savings Association . . . knowing the same to be false." The alleged falsehood was a statement that the loan and credit was to be used to purchase materials for additions to a dwelling house, but that the same was used for the construction of a new dwelling house. By its terms, the act prohibits the making, passing, uttering, publishing, preparing and presenting of a false application for credit and does not require that there be a pecuniary loss to the United States. (18 U. S. C. A., §1010.)

The question thus presented is whether Section 3287 suspending the running of the Statute of Limitations, as to the limited offenses therein set forth, principally involving fraud or attempted fraud against the United States, is applicable to the offenses herein charged. Since Section 3287 was recently adopted, most judicial interpretations are of a prior like statute, 18 U. S. C., 1940 ed., Section 590a. This section was interpreted by two diversified opinions of two Circuit Courts of Appeal.

The case of *United States v. Gottfried,* 165 F. 2d 360, involving prosecution under Section 80 of the Criminal Code, charging the defendant and his corporation with making false statements to the O.P.A. regarding the quantity of sugar used by said corporation, the Circuit Court of Appeal, for the Second Circuit District, held Section 590a to be applicable and that the action was not barred by the Statute of Limitations. However, this prosecution was commenced approximately one year prior to the President's proclamation and the active engaging in war was primarily responsible for the belated prosecution. The court holding at page 367:

> "Last is the question of the statute of limitations. The indictment for making the fraudulent statement was filed on January 28, 1946, more than three years after the crime had been committed—April 29th, 1942—; and, was concededly barred unless the Act of 1942, as amended in 1944, extended the time. The act provided that in three classes of crimes the prosecution should not be barred, until three years after hostilities had ended; and of these three the first was those 'involving defrauding or attempts to defraud the United States or any agency thereof.' The argument—drawn from the Congressional debates—is that this language should be confined to frauds of those who contracted with the United States or supplied it with materials, and that it does not include interference even though fraudulent which results in no pecuniary loss. Textually this reasoning has nothing to commend it, except so far as the word, 'fraud,' many imply pecuniary loss; and, whatever might be said as a new matter for so circumscribing that word, it has been the law, at least since

1910, that in the statute under which this indictment was drawn, 'fraud' includes any conduct, 'calculated to obstruct or impair its' (the United States') 'efficiency and destroy the value of its operations and reports.' We see no reason for reading the words, 'defrauding the United States' in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. *Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar.*" (Emphasis ours.)

The subsequent case of *Marzani v. United States,* 168 F. 2d 133, involved the making of false statements to Governmental agencies as to the qualifications and eligibility of the defendant to Government employment. This prosecution was likewise under Section 80 of the Criminal Code, commonly designated "False Claims Act." In it, a new issue was raised, namely, did the act complained of, constitute a fraud of the United States? Both the District Court, in 71 Fed. Supp. 615 and the Circuit Court, for the District of Columbia, held that the Suspension Act did not apply, since pecuniary loss to the United States was not an essential element to the offense, holding at page 136:

"It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such

defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding of the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one's qualifications for federal employment can be . . .

"The difficulty with the foregoing contention is that it ignores the plain rulings in Noveck and kindred cases. These cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon as by its counsel, we can see no escape from that conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted."

This case was received by the Supreme Court on a Writ of Certiorari (335 U. S. 895) which made the following memorandum:

"December 20, 1948. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice

> Douglas took no part in the consideration or decision of this case."

Subsequently (336 U. S. 910), the court made the following memorandum:

> "February 7, 1949. 335 U. S. 895, *ante,* 431, 69 S. Ct. 299. The petition for rehearing is granted and the case is ordered restored to the docket for reargument. Mr. Justice Douglas took no part in the consideration or decision of this application."

The last memorandum of such case is found in 336 U. S. at page 922, wherein the Supreme Court made the following conclusion:

> "March 7, 1949. *Per Curiam:* Upon hearing, the judgment entered December 20, 1948, affirming the judgment by an equally divided Court, is adhered to and reaffirmed by an equally divided Court. Mr. Justice Douglas took no part in the consideration or decision of this case."

Standing on their own footing, the cases relied upon in *Marzani v. United States, supra,* have a persuasive effect upon the subject matter herein discussed.

Although these cases discuss principally, false statements made in regard to the taxation laws of the United States, they discuss such laws and the question of the application of the Suspension Act of the statute of limitations, in regard thereto, upon the broad principle of whether or not pecuniary loss is an element of the offense. The conclusion reached by said cases is that pecuniary loss is not essential to the offense and need not be alleged in the charge. They also point out that the defrauding

of the United States is not the act prohibited but the interference with the orderly function of the Government caused by false statements, is the situation which the act seeks to remedy and prohibit.

The logical and natural conclusion arrived at from such authorities is that the Suspension Act (Sec. 3287), by its wording, does not deal with statutes having such purposes, but deal with those prohibiting frauds on the Government and wherein the element of defrauding is an essential and necessary element.

Marzani v. United States, supra, discusses: *United States v. Noveck,* 271 U. S. 201; *United States v. McElvain,* 272 U. S. 633; *United States v. Scharton,* 285 U. S. 518, and *United States v. Gilliland,* 312 U. S. 86, and reviews said cases at page 135 as follows:

> "The question before us is whether the Suspension Act applies to offenses under the False Claims Act.
>
> "We see no escape from the conclusion impelled by two decisions of the Supreme Court, United States v. Noveck (and its companion cases, United States v. McElvain and United States v. Scharton) and United States v. Gilliland.
>
> "In United States v. Noveck, the question was whether a statute which read, 'That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, * * * the period of limitation shall be six years,' applied to perjury in an income tax return. The indictment alleged that the perjury was for the 'purpose of defrauding the United States.' The Supreme Court held that the six-year statute did not apply, because

defrauding the United States is not an element of the crime of perjury. The language of that statute of limitations is the same as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

"In United States v. McElvain, *supra,* the Court held that the six-year statute of limitations involved in United States v. Noveck did not apply to a conspiracy to defraud the United States by making a false income tax return. In United States v. Scharton, *supra,* the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment.

"The United States seems to agree with the foregoing view of the Noveck and its allied cases. It says that the Suspension Act 'was modeled upon the proviso' in the 1921 Act; that the 1921 and 1926 provisos 'are in all essential respects identical with' the present Suspension Act; and that 'said cases were decided in accord with the principle first enunciated in United States v. Noveck, to wit, that in order to be affected by the suspension statute 'defrauding or an attempt to defraud' the United States must be an ingredient under the statute defining the offense.'

"In United States v. Gilliland, *supra,* the question was whether the False Claims Act was restricted to

matters in which the Government has some financial or proprietary interest. The Court held that it was not. The conclusion was premised largely on the fact that by amendment in 1934 Congress had eliminated from the statute as it had theretofore existed the words 'or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States,' and in legislative history of the amending act showed that this omission was deliberate and intentional. Thus, the Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act."

Basing their opinion upon *United States v. Noveck* and *United States v. McElvain* (both discussed in *Marzani v. United States, supra*) on December 20, 1950, the United States Court of Appeals for the Second Circuit, by almost the identical bench that decided *United States v. Gottfried, supra,* again ruled upon the question of the applicability of the Suspension Act, upon a charge of making a false statement. In the case of *United States v. Obermeier,* 186 F. 2d 243, wherein the defendant, while under oath, made false statements to a United States Naturalization Examiner, the court interpreted the present Section 3287 and held on page 256 as follows:

"The government contends, however, that, in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in United States v. Noveck, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904; United States v. McElvain, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed. 451, and United States

v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917. *As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense,' and does not, absent such a statutory definition, apply to perjury or false swearing, even when the United States is directly interested. Nothing in 8 U. S. C. A., Section 746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crime.*" (Emphasis ours.)

In supporting such law, the court cites the following authorities:

> "In U. S. v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the offense was so defined as to make fraud an ingredient. So, too, in Gottfried v. U. S., 2 Cir., 165 F. 2d 360 as we there interpreted the statute creating the crime. See also Marzani v. U. S., 83 U. S. App. D. C. 78, 168 F. 2d 133."

The court's attention is respectfully invited to the fact that the court that decided the *Gottfried* case, subsequently based its ruling in the *Obermeier* case, upon the decision of *Marzani v. United States, supra.*

Title 18, United States Code—Crimes and Criminal Procedure, Section 1010, defining the crime herein charged, does not make fraud or attempted fraud, against the United States or one of its agencies, an ingredient of the offense. Such section provides as follows:

> "Federal Housing Administration transactions:
>
> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan

or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters; forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

In the case of *United States v. Mellen,* 96 F. 2d 462, which, likewise in the case alleged herein, a violation of the prior law, 18 U. S. C. A., section 80, by the filing of known false credit applications contrary to the rules of the Federal Housing Administrator, the court discusses the fact that pecuniary loss was not an element to such offense, holding at page 463:

"The appellants question the sufficiency of the indictment on the theory that there can be no violation of 18 U. S. C. A., section 80 without pecuniary loss to the government. Before the amendment of 1934 the scope of the statute was, indeed, so limited. United States v. Cohn, 270 U. S. 339, 46 S. Ct. 251, 70 L. Ed. 616; U. S. *ex rel.* Starr v. Mulligan, 2 Cir. 59 F. 2d 200. But by the amendment just mentioned the statute was extended to cover the willful making of any false or fraudulent statements or representations 'in any matter within the jurisdiction of any department or agency of the United States.'

In this respect the element of pecuniary loss to the government is no longer an essential ingredient of the crime . . ." (Emphasis ours.)

Said case is cited with approval in the following cases:

United States v. Goldsmith, 108 F. 2d 917, 918;

United States v. Rohleder, 157 F. 2d 126, 129.

It is respectfully submitted that since pecuniary loss to the Government is not an element of the offenses charged, the Suspension Act (Section 3287) is inapplicable herein.

The point of law hereinbefore presented has never reached the direct attention of this Honorable Court, although the same has been discussed in the case of *Bridges v. United States,* 184 F. 2d 881, decided by this court on August 24, 1950. In said action, the appellant was on bond pending appeal. The District Court revoked its previous order granting bail pending appeal and the question presented was the sufficiency of the ground for such revocation. This Honorable Court, through Judge Healy, examined the record to ascertain if there was reasonable ground of appeal, including the effect of the Suspension Act, and held at page 883:

> "Unless some other provision of law provides the contrary the indictment here is barred by this limitation, it having been found and returned some three years and seven months after the commission of the most recent of the alleged offenses.
>
> In Marzani v. United States, 1948, 83 U. S. App. D. C. 78, 168 F. 2d 133, the Court of Appeals of the District of Columbia considered the statutory provisions which the government claims suspended the running of the three-year limitation as against the

offenses for which Bridges was indicted. The case before that court involved a charge that the government had been defrauded by false swearing by Marzani, a civil service employee, that he had never been a member of the Communist Party. The charge appears closely analogous to those found in the present indictment. The court held the suspension provision inapplicable and reversed the conviction on nine counts on the ground that the prosecution was barred by the ordinary three-year limitation. Certiorari was granted by the Supreme Court and the judgment affirmed by an equally divided court. 335 U. S. 895, 69 S. Ct. 299, 93 L. Ed. 431. In Unitied States v. Gottfried, 1948, 165 F. 2d 360, the Second Circuit reached what appears to be a contrary conclusion in considering an indictment charging Gottfried with making a false and fraudulent statement in writing in a matter affecting the administration of the Office of Price Administration. The indictment had been found more than three years after the commission of the crime, but the court thought that the running of the statute was suspended by the act extending the limitation until three years after hostilities had ended in cases involving defrauding or attempts to defraud the United States or any agency thereof. The Supreme Court denied certiorari, 333 U. S. 860, 68 S. Ct. 738, 92 L. Ed. 1139.

The effect of the suspension acts or the force of earlier decisions relied on or distinguished in the Marzani and Gottfried cases need not here be considered, nor do we now express, or even entertain, any opinion as to which court was right.

Enough to say that in the condition of the decisions a seriously debatable question is presented for determination by this court and probably by the Supreme Court." (Emphasis ours.)

This decision was prior to the case of *United States v. Obermeier,* and therefore, does not consider such case and the effect of its ruling upon the *Gottfried* case and its adherence to the rule of the *Marzani* case.

It is respectfully submitted that this Honorable Court has not heretofore construed the applicability of the Suspension Act to the facts herein stated, and that the law pertaining to such matters, excludes the offenses contained in Counts Two (2) and Four (4) of the Indictment from such Act.

(b) That if the Suspension Act Was Applicable, the Offenses Charged in Counts Two (2) and Four (4) of the Indictment Would Still Be Barred by the Statute of Limitations.

If it should be held by this Honorable Court that the Suspension Act was applicable to the offenses charged in Counts Two (2) and Four (4) of the Indictment, it is respectfully submitted that under the terminology of Section 3287, the effect of such Section no longer stayed Section 3282, which barred the prosecution of the offenses herein charged by reason of the elapse of three years.

As alleged in Count Two (2), the facts therein stated occurred on February 6, 1947, and as alleged in Count Four (4), the facts therein stated occurred on January 27, 1947. Section 3287 suspended the Statute of Limitations *"until three years after the termination of hostilities as proclaimed by the President . . ."* (Emphasis ours.) The President, in his proclamation, 2714 (hereinbefore cited), declared that the hostilities had terminated and ceased *"effective twelve o'clock noon, December 31, 1946."* (Emphasis ours.) Thus, computing the three-year period

subsequent thereto, prosecutions were suspended until December 31, 1949, and thereafter, the Government had said three-year period terminating on the 31st day of December, 1949, in which to commence prosecution.

Counts Two (2) and Four (4) having occurred subsequent to the date of the termination of hostilities, were therefore not effected by such statute nor was the Government required to prosecute them within the three-year period after the termination of hostilities, but it is respectfully submitted that they were controlled by Section 3282, which allowed the Government a three-year period in which to commence prosecution. Thus, on Count Two (2), prosecution was required by law to be commenced prior to February 6, 1950, and on Count Four (4), prior to January 27, 1950. The Indictment herein was found and filed on June 28, 1950.

General principles of law and the decisions of our Supreme Court clearly indicate that it was the intention of the Legislature to make the Statute of Limitations commence after the conclusion of the period set forth in Section 3287. The wording of the section and the interpretation of like statutes, in prior wars, indicate that as a matter of law, the effect of the suspension of the Statute of Limitations, causes the exclusion from the computation of the period therein set forth, of the period during which the Statute was suspended.

The general principle is set forth in 22 C. J. S. 361; Criminal Law, Section 228, as follows:

> ". . . At any rate, a criminal prosecution is barred where, exclusive of any time when the opera-

tion of the statute was suspended, the statutory period has elapsed before the prosecution was commenced."

This principle was applied during the suspension of the statute caused by the Revolutionary War.

Ogden v. Blackledge, 2 Cranch 272;
Hopkirk v. Bell, 3 Cranch 354.

A like rule was followed during the Civil War, wherein as to each respective state, denying Federal Authority, the period was excluded between the denial of such authority and the proclamation of the President, as to the restoration of such Federal Authority.

United States v. Wiley, 11 Wall. 508;
Caperton v. Boyer, 11 Wall. 216;
Hiatt v. Brown, 15 Wall. 177;
Adger v. Alaton, 15 Wall. 555;
Holdene v. Sumper, 15 Wall. 600;
Batesville Institute v. Hauffman, 18 Wall. 131;
Ross v. Jones, 22 Wall. 576.

It is respectfully submitted that if any of the offenses in the Indictment had been committed prior to the 31st day of December, 1946, under the Suspension Act, the Government would have had three years after said date in which to commence its prosecution; but as to offenses alleged to have been committed subsequent to said 31st day of December, 1946, as is true of Counts Two (2) and Four (4) of the Indictment herein, the offenses are governed by and are now barred by the provisions of the Statute of Limitations to wit, Section 3282, Title 18, United States Code—Crimes and Criminal Procedure.

II.

Having Plead Nolo Contendere, the Appellant May, Upon Appeal, Contend That the Counts to Which He Made Such Plea, Do Not State a Public Offense by Reason of the Fact That They Are Barred by the Statute of Limitations.

(a) That Pleading Either the Occurrance Within the Statute of Limitations or Elements That Extend the Statute of Limitations Is Jurisdictional to a Criminal Charge.

Counts Two (2) and Four (4) of the Indictment, state that on a specific date, the acts complained of occurred, which said dates are both more than three years prior to the founding or filing of the Indictment. No acts are alleged in either Count, which factually, would extend the Statute of Limitation such as the allegation of flight or absence from the jurisdiction. Under such circumstances, it is respectfully contended by the Appellant, that neither Count states a public offense. Although the same is of persuasive authority, the rule contended for by Appellant is emphatically stated by the Supreme Court of the State of California, in the case of *People v. McGee (John),* 1 Cal. 2d 611, at page 613, as follows:

> "In our view, the more desirable rule is that the statute is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense. The point may therefore be raised at any time, before or after judgment.
>
> This is, of course, a rule essentially different from that governing civil actions, and it results from the different character of the statute in the two kinds of proceedings. In civil actions the statute is a privilege which may be waived by the party. In criminal

cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. (See People v. Hoffman, *supra*; State v. *Bilboa,* 38 Idaho 92 (213 Pac. 1025, 222 Pac. 785).) It follows that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone."

Subsequently, the Appellate Court of the State of California summarized the rule in the case of *In re McGee (Edward),* 29 Cal. App. 2d 648, at page 649:

"It is settled law in California that the statute of limitations in criminal actions is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations, fails to state a public offense. The point may therefore be raised at any time, before or after judgment. (People v. McGee, 1 Cal. 2d 611 (36 Pac. (2d) 378).)"

Whereas, the Federal cases have not been as exact in their terminology, it is respectfully submitted that they set forth and follow the same rule.

In the case of *Bold v. United States,* 265 Fed. 581, decided in this Honorable Circuit on May 3, 1920, this Honorable Court held at page 583:

"It is further urged that the evidence of Morris did not fix the date of the purported declarations of the defendant in harmony with that charged in the indictment. But we think the record clearly refutes this claim. *Moreover, the precise date alleged is not*

material, so long as it is shown that the offense was committed before the finding of the indictment and within the period of the statute of limitations—conditions which were fully met here. United States v. Fracis (D. C.), 144 Fed. 520; Hume v. United States, 118 Fed. 689, 696, 55 C. C. A. 407." (Emphasis ours.)

In the case of *Weatherby v. United States,* 150 F. 2d 465, decided in the Tenth Circuit on June 28, 1945, the court held at page 467:

"It sufficiently appears that the unlawful use of the mails was within the statutory period of limitations. Where time is not an essential ingredient of the offense, and the indictment charges facts showing the offense was committed within the statutory period of limitations, a defect in the allegation of time is one of form only."

In support of the latter statement of law, said court cites the following authorities:

Thompson v. United States, 3 Cir., 283 Fed. 895, 898;

United States v. McKinley, C. C. Ore., 127 Fed. 168, 170;

United States v. Gaag, D. C. Mont., 237 Fed. 728, 730, 731;

United States v. Howard, D. C. Tenn., 131 Fed. 325, 335.

Such rule is followed in the recent case of *United States v. Parrino,* 180 F. 2d 613, decided by the Second Circuit on March 7, 1950, wherein the court held at page 615:

"It follows that, if three years pass after a kidnapping, an indictment is barred if the victim has been

> released 'unharmed,' within that period . . . Therefore, unless the three year statute was tolled by Parrino's fight, the conviction must be reversed and the case remanded for a new trial. The Third Circuit in United States v. Parker has read the statute as we do."

In the recent case of *United States v. Obermeier,* 186 F. 2d 243 (hereinbefore cited at length), the prosecution and sentencing upon the charge of making false statements in a naturalization proceedings, was reversed since the Indictment was brought more than three years after the date alleged in the Counts challenged, the court indicating that the statute involved Title 18, United States Code—Crimes and Criminal Procedure, Section 3282, expressly provides that

> "no person shall be *prosecuted,* tried or *punished* for any offense, not capital, *unless the indictment is found . . . within three years next after such offense shall have been committed."* (Emphasis ours.)

It is respectfully submitted that Counts Two (2) and Four (4) of the Indictment herein did not state public offenses in that it affirmatively appears in the wording of said Counts that the alleged Act complained of, was not committed within the period allowed by statute for the prosecution of criminal offenses, which is one of the matters that is jurisdictional to the court and necessary in order that the crime charged, constitutes a public offense.

(b) That After a Plea of Nolo Contendere, the Appellant May Appeal Upon the Ground That the Indictment or Counts Thereof to Which He Pleaded, Do Not Constitute a Public Offense.

As indicated in the statement of facts herein contained, the Appellant first presented the question of the Statute of Limitations to the trial court. The trial court denied his Motion to Quash and Dismiss upon said ground.

This is factually similar to the procedure followed by the defendant in the case of *United States v. Zullo,* 151 F. 2d 560, 561:

> "The appellant moved for a dismissal of the second count on the ground that an offer to bribe a juror does not come within the language of Section 237. The motion was denied. Thereafter the appellant pleaded guilty to all three counts of the indictment and was sentenced thereon. This appeal is from the judgment rendered on the second count. The method here followed of raising the particular question brings the matter properly before us. Obviously the appellant, after the District Court's decision on the motion, had to plead guilty to the second count of the indictment or stand trial."

Herein, when the Appellant was faced with the alternative of pleading or standing trial, he elected to plead *nolo contendere* to said Counts Two (2) and Four (4). This plea was accepted by the trial court.

In the case of *Oesting v. United States,* 234 Fed. 304, decided in the Ninth Circuit on July 24, 1916, the de-

fendant plead guilty and thereafter appealed. This Honorable Court held at page 306:

> "The defendant in error contends that the plaintiff in error, having pleaded guilty to the indictment and having presented no objection to the indictment in the court below, cannot be heard to object to the same in this court. Many authorities are cited for and against the contention. We may accept the rule to be this: First, that after a plea of guilty the only objection that can be made to the indictment in the court of first instance is that it 'fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment' (United States v. Bayaud (C. C.), 16 Fed. 376); and, second, that by the defendant's failure to demur to an indictment, or to enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter which goes to the form in which the offense is stated, but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged (Hardesty v. United States, 168 Fed. 25, 93 C. C. A. 417; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Harris v. United States, 227 U. S. 340, 33 Sup. Ct. 289, 57 L. Ed. 534)."

In the case of *Berg v. United States,* 176 F. 2d 122, also decided in the Ninth Circuit, the original decision be-

ing filed on June 15, 1949, the defendant plead guilty to several counts of an indictment. This Honorable Court, in discussing a plea of guilty, held at page 125:

> "A plea of guilty means guilty as charged in the indictment. If the indictment states no basis for jurisdiction, such a plea will not create a sufficient charge. However, by a plea of guilty, all averments of fact are admitted, all defects not jurisdictional are cured, all defenses are waived and the prosecution is relieved from the duty of proving any facts."

In its notes to such decision, this Honorable Court cites numerous decisions which in general, hold that a plea of guilty waives defects in the forms of allegations not jurisdictional, but does not waive the contention that the Indictment does not charge a public offense.

Although all cases hereinbefore cited were predicated upon a plea of guilty, the case of *United States v. Bradford,* 160 F. 2d 729, decided by the Circuit Court of Appeals of the Second Circuit on March 18, 1947, wherein a Writ of Certiorari was denied by the Supreme Court on May 19, 1947, applies the same rules to a plea of *nolo contendere.* In said case, the court holds at page 730:

> "Defendant pleaded *nolo contendere* to an information charging him with using preference ratings established under section 301 of the Second War Powers Act, 50 U. S. C. A. Appendix, section 633, to secure quantities of electrical equipment greater than the ratings called for. He now appeals from a

sentence imposed pursuant to his plea. *His contention, that the information fails to charge an offense, survives his plea.* United States v. Ury, 2 Cir., 106 F. 2d 28, 124 A. L. R. 569; United States v. Max, 3 Cir., 156 F. 2d 13." (Emphasis ours.)

The Supreme Court of the United States, in the case of *United Brotherhood v. United States,* 330 U. S. 395, wherein the Appellant, a corporation, had plead guilty to an indictment charging the criminal restraint of trade, held at page 412, as follows:

"Ordinarily a plea of *nolo contendere* leaves open for review only the sufficiency of an indictment."

In supporting its said ruling, said court cites in the footnotes of said case, the following law and authorities:

"Nolo contendere 'is an admission of guilt for the purposes of the case.'

Hudson v. United States, 272 U. S. 451, 455, 71 L. ed. 347, 349, 47 S. Ct. 127;

United States v. Norris, 281 U. S. 619, 622, 74 L. ed. 1076, 1077, 50 S. Ct. 424.

And like pleas of guilty may be reviewed to determine whether a crime is stated by the indictment.

Hocking Valley R. Co. v. United States (C. C. A. 6th), 210 F. 735, 738;

Tucker v. United States (C. C. A. 7th), 196 F. 260, 262, 41 L. R. A. (N. S.) 70."

It is respectfully submitted that after a plea of *nolo contendere,* the Appellant was entitled to appeal upon the ground that the counts of the Indictment to which he plead do not constitute a public offense.

III.

That Count Four (4) of the Indictment Does Not State a Public Offense in That It Is Not Indicated Therein That the Application Therein Described, Was for Credit or the Amount Thereof.

The code section applicable to the offenses charged is Section 1010 of Title 18, United States Code—Crimes and Criminal Procedure. This section reads as follows:

> *"Federal Housing Administration transactions.* Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Each of Counts Two (2) and Four (4), after alleging the aforegoing purpose in the wording of the statute, thereupon proceeds to further allege that the defendants "did cause to be presented to the Bank of America Na-

tional Trust and Savings Association, a written Federal Housing Administration, Title I credit application for a property improvement loan, containing the signatures of" the respective applicants named in each count, Count Two (2) proceeding to allege that "said application *applying for and requesting credit in the amount of $2,498.00, and said application* stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house." Each count thereafter alleges that the defendants knew that the said loan was not for such purpose, but was to be used to purchase materials for the construction of a new dwelling house. Count Four (4) does not contain that part of such allegation that is emphasized, and does not contain the element that such credit application applied for or requested credit in any specified sum of money.

It therefore appears from Count Four (4) that the application therein presented did not apply for or request any credit or the amount of credit requested.

It is respectfully submitted that in order that the application should be one of those germane to the code section, the same factually must seek to obtain by applying for and requesting credit in some definite sum, and that the absence of such application and request, excludes the instrument from the operation of the statute. The presentation to the banking institution, of a signed application form, containing no request for credit is not an act prohibited by the statute, since the same could not influence the Federal Housing Administration in the conduct of its functions. In the absence of such application or request for a definite sum of money, no action could be taken by

the Federal Housing Administration thereon. The Appellant sought to elicit information that would be curative of this omission by his Motion for Bill of Particulars [See Bill of Particulars, item 25, Tr. of Rec. p. 13; item 66, Tr. of Rec. p. 24; item 105, Tr. of Rec. p. 31]. The District Court refused Appellant's request for such particulars [Tr. of Rec. p. 39].

It is respectfully submitted that said allegation is a matter of substance and that its absence makes said count fatally defective.

In the case of *Oesting v. United States,* 234 Fed. 304, hereinbefore cited at length, this Honorable Court ruled that the objection that the Indictment "fails to describe the various acts intended to be proved with the reasonable certainty which the law requires to constitute a valid indictment," survives the plea of guilty. Such rule has been adhered to by subsequent decisions.

Appellant respectfully invites the court's attention to the case of *Michener v. United States,* 170 F. 2d 975, wherein the law contended for is stated at page 975, as follows:

> " 'If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. If, however, it fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act, such details may be supplied by a bill of particulars without affecting the integrity of the prosecution. In such

case, the duty devolves upon a defendant to make seasonable and appropriate application for the information desired.' Myers v. United States, 8 Cir., 15 F. 2d 977, 985."

It is respectfully submitted that the omission of the allegation that the application described in Count Four (4) of the Indictment was for the purpose of "applying for and requesting credit" in a specific sum of money, is a matter of substance and a material ingredient of the offense alleged in said Section 1010 and that by reason thereof, such count is fatally defective.

Conclusion.

It is respectfully submitted that the plea of *nolo contendere* of Appellant to Counts Two (2) and Four (4) of the Indictment is ineffective, since said counts are both upon the facts therein stated, barred by the Statute of Limitations, and Count Four (4) fails to state essential matters of substance. It is further respectfully submitted that for such reasons, the Judgment and Commitment [Tr. of Rec. p. 40] of the trial court, should be reversed by this Honorable Court.

Respectfully submitted,

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Attorney for Appellant.